

BEFORE THE DEPARTMENT OF PUBLIC  
HEALTH AND HUMAN SERVICES OF THE  
STATE OF MONTANA

In the matter of the amendment of ARM	)	NOTICE OF PUBLIC HEARING
37.40.307, 37.40.330, and 37.40.361	)	ON PROPOSED AMENDMENT
pertaining to Medicaid Nursing Facility	)	
Reimbursement	)	

TO: All Interested Persons

1. On July 11, 2007, at 3:30 p.m., a public hearing will be held in the Wilderness Room, 2401 Colonial Drive, Helena, Montana to consider the proposed amendment of the above-stated rules.

The Department of Public Health and Human Services will make reasonable accommodations for persons with disabilities who need an alternative accessible format of this notice or provide reasonable accommodations at the public hearing site. If you need to request an accommodation, contact the department no later than 5:00 p.m. on July 2, 2007, to advise us of the nature of the accommodation that you need. Please contact Dawn Sliva, Office of Legal Affairs, Department of Public Health and Human Services, P.O. Box 4210, Helena, MT 59604-4210; telephone (406)444-5622; FAX (406)444-1970; e-mail dphhslegal@mt.gov.

2. The rules as proposed to be amended provide as follows. Matter to be added is underlined. Matter to be deleted is interlined.

37.40.307 NURSING FACILITY REIMBURSEMENT (1) remains the same.

(2) Effective July 1, 2001, and in subsequent rate years, nursing facilities will be reimbursed using a price based reimbursement methodology. The rate for each facility will be determined using the operating component defined in (2)(a) and the direct resident care component defined in (2)(b):

(a) through (c) remain the same.

(d) The total payment rate available for the period July 1, ~~2006~~ 2007 through June 30, ~~2007~~ 2008 will be the rate as computed in ~~(5)~~ (2), plus any additional amount computed in ARM 37.40.311 and 37.40.361.

(3) Providers who, as of July 1 of the rate year, have not filed with the department a cost report covering a period of at least six months participation in the Medicaid program in a newly constructed facility shall have a rate set at the statewide median price as computed on July 1, ~~2006~~ 2007. Following a change in provider as defined in ARM 37.40.325, the per diem rate for the new provider shall be set at the previous provider's rate, as if no change in provider had occurred.

(4) through (12) remain the same.

AUTH: 53-2-201, 53-6-113, MCA

IMP: 53-6-101, 53-6-111, 53-6-113, MCA

37.40.330 SEPARATELY BILLABLE ITEMS (1) through (3)(b) remain the same.

(4) Physical, occupational, and speech therapies which are not nursing facility services may be billed separately by the licensed therapist providing the service, subject to department rules applicable to physical therapy, occupational therapy, and speech therapy services.

(a) Maintenance therapy and rehabilitation services within the definition of nursing facility services in ARM 37.40.302, are reimbursed under the per diem rate and may not be billed separately by either the therapist or the provider.

(b) and (5) remain the same.

(6) All prescribed medication, ~~including flu shots and tine tests,~~ may be billed separately by the pharmacy providing the medication, subject to department rules applicable to outpatient drugs. The nursing facility will bill Medicare directly for 100% reimbursement of influenza Medicare Part B covered drugs and vaccines and their administration when they are provided to an eligible Medicare Part B recipient. Medicaid reimbursement is not available for influenza Medicare Part B covered drugs and vaccines and related administration costs for residents that are eligible for Medicare Part B.

(7) through (10) remain the same.

AUTH: 53-2-201, 53-6-113, MCA

IMP: 53-2-201, 53-6-101, 53-6-111, 53-6-113, MCA

37.40.361 DIRECT CARE WAGE REPORTING/ADDITIONAL PAYMENTS FOR DIRECT CARE WAGE AND BENEFITS INCREASES (1) Effective for the period July 1, ~~2005~~ 2007 and every six months thereafter, nursing facilities must report to the department ~~entry level and average actual~~ hourly wage and benefit rates paid for all direct care workers that will receive the benefit of the increased funds. The reported data shall be used by the department for the purpose of comparing rates of pay for comparable services.

(2) The department will pay Medicaid certified nursing care facilities located in Montana that submit an approved request to the department a per day add-on payment in addition to the amount paid as provided in ~~(4)~~ ARM 37.40.307 and 37.40.311 as an add-on to their computed Medicaid payment rate to be used only for wage and benefit increases for direct care workers in nursing facilities.

(a) The department will determine a per day add-on payment, commencing July 1, ~~2005~~ 2007 and at the beginning of each state fiscal year thereafter, as a pro rata share of appropriated funds allocated for increases in direct care wages and benefits.

(b) To receive the direct care add-on, a nursing facility shall submit for approval a request form to the department stating how the direct care add-on will be spent in the facility to comply with all statutory requirements. The facility shall submit all of the information required on a form to be developed by the department in order to continue to receive the additional add-on amount for the entire rate year. The form will request information including but not limited to:

(i) ~~the number of full-time equivalents employed~~ number by category of each ~~authorized~~ direct care worker that will receive the benefit of the increased funds;

(ii) the ~~current~~ actual per hour rate of pay ~~with before~~ benefits and before the direct care wage increase has been implemented for each ~~category of worker that~~ will receive the benefit of the increased funds;

(b)(iii) through (3) remain the same.

AUTH: 53-2-201, 53-6-113, MCA

IMP: 53-2-201, 53-6-101, 53-6-111, 53-6-113, MCA

3. The Department of Public Health and Human Services (the department) is proposing amendments to ARM 37.40.307, 37.40.330, and 37.40.361 pertaining to Medicaid nursing facility reimbursement. The proposed amendments are intended to implement funding for nursing facility reimbursement appropriated for state fiscal year 2008, commencing July 1, 2007. Funding from the health and Medicaid initiatives account in the state special revenue fund and funds in the general fund provides funding for a 2.5% rate increase for nursing facility providers, as well as funding for a direct care worker wage increase to raise Certified Nurse Aide direct care worker wage and related benefits to \$8.50 an hour. Any remaining funds may be used only to raise wages and related benefits up to \$0.70 an hour for all direct care workers and other low-paid staff.

The department is also proposing amendments to incorporate changes in federal regulations that would adjust cost limits. Other amendments would update the rules where necessary, to provide clarifications, and to make the rules easier to understand and administer.

#### ARM 37.40.307

The department does not, at the time of publication, have all the information necessary to calculate final payment rates for nursing facility providers according to the methodology at ARM 37.40.307. This methodology is explained below. The department intends to make the rates effective July 1, 2007. The final rates will be set according to final case mix information and the funding levels authorized by the 2007 Montana Legislature.

The department will deliver rate sheets to all providers in advance of the rule hearing. The rate sheets will verify proposed rates and are intended to facilitate comments. They will be delivered as soon as case mix information, Medicaid utilization data, and other details necessary to compute accurate reimbursement rates become available. The rates will distribute available funding as necessary to meet the department goal of a price-based system of reimbursement and will be computed to incorporate and implement legislatively appropriated funding levels.

#### ARM 37.40.330

The department is taking this opportunity to update the prescription on drug provisions of this rule to make it clear that Medicare Part B should be billed for all drugs covered under that Part. The existing language only mentioned influenza

vaccines and could have been interpreted as limiting nursing facilities to that service only. The proposed language would avoid confusion and would make the rule easier to understand and administer. The proposed amendment would have no actual effect on department policy.

#### ARM 37.40.361

The 2007 Montana Legislature authorized the department to distribute additional provider reimbursement amounts for nursing facility direct care worker wages and benefits increases. Funds in the direct care worker wage increase may be used only to raise direct care worker wages and related benefits. They cannot be used to offset any other wage increase mandated by other laws, contracts, or written agreements that will go into effect at the same time as or after implementation of the appropriation. Funds in the direct care worker wage increase must be used first to raise Certified Nurse Aide direct care worker wages and related benefits to the equivalent of \$8.50 an hour. Any remaining funds could be used only to raise wages and related benefits up to \$0.70 an hour for all direct care workers and other low-paid staff. The department will be required to provide documentation that the appropriated funds are used solely for direct care worker wage increases. The documentation must include initial wage rates, wage rates after the rate increases have been applied, and wage rates every six months after the rate increases have been granted. In addition to the appropriation for a direct care worker wage increase, the pending budget includes funding for the department to prepare a semiannual report for the legislative finance committee and the children, families, health, and human services interim committee summarizing direct care wage rates and the effects of the direct care worker wage increase on wage levels.

The 2007 Montana Legislature authorized the department to distribute funds from the health and Medicaid initiatives account in the state special revenue fund to provide a 2.5% rate increase for nursing facility providers.

Additionally, the Montana Legislature considered whether it will continue to approve the use of local county matching funds as a source of additional revenue for nursing facility providers in order to maintain public access to high quality nursing facility services. The Centers for Medicare and Medicaid Services (CMS) has issued a notice of proposed rulemaking (CMS-2258-P), with changes to 42 CFR Parts 433, 447, and 457 related to cost limits for providers operated by "units of government" and altering the definition of "public" status that would apply to nursing facility services rendered on or after September 1, 2007. If approved, Montana will incorporate the proposed CMS changes and update Medicaid nursing facility reimbursement rules using a separate rule notice.

#### Price Based System:

For rate year 2008 (July 1, 2007 through June 30, 2008) the nursing facility per diem rate will be computed as follows:

(1) The Medicaid per diem rates will include two components. The operating component, which includes both operating and capital combined, will be the same rate for all nursing facilities and will be 80% of the overall price. The nursing component will be adjusted for individual nursing facility acuity and will be 20% of the overall price.

(2) Medicaid per diem rates will be established annually each July 1.

(3) The minimum data set (MDS) case mix assessment data will be used in the computation of each facility's resident acuity. Each nursing facility's case mix index will be calculated quarterly based on a point in time, using the most recent annual or quarterly MDS information. Medicaid case mix data for annual rate setting will be based on the most recent four quarter average of Medicaid CMLs for each nursing facility.

Price-based rate increase:

Funding from the health and Medicaid initiatives account in the state special revenue fund in the amount of approximately \$3,544,542 would provide funding for a 2.5% rate increase for nursing facility providers based on the state and federal share of funding for nursing facility reimbursement.

Additional Payments for Direct Care Wage and Benefit Increases:

The 2007 Montana legislature approved legislation that would authorize the department to distribute about \$5,107,142 to facilities for a wage and benefit increases. The bill would fund a minimum for Certified Nurse Aide direct care worker wages and related benefits of \$8.50 an hour. Any remaining funds would be used only to raise wages and related benefits up to \$0.70 an hour for all direct care workers and other low-paid staff.

These funds would be distributed in the form of a direct care wage add-on in addition to the established price-based provider reimbursement rate effective July 1, 2007.

Alternative:

If funding levels are not sufficient to continue a price-based approach, the department will be faced with the following issues. Statewide occupancy rates are currently 74% in Montana nursing facilities. At the same time, the care needs of the typical nursing facility resident are increasing. Residents are being admitted at an older age with medically fragile and complex care needs that can no longer be met in home or community settings. As the trend toward lower occupancy and increased acuity continues, it will become more important than ever that nursing facility providers receive rate increases that are reflective of the increased cost of doing business. If Medicaid rates are not sufficient to stabilize small rural providers of nursing facility services, they will find it more difficult to keep their doors open due to decreasing occupancy levels and an inability to predict the level of revenue

available. It would be impossible to plan the best way to provide nursing facility services in their communities. Facility reductions would make it more difficult for Medicaid recipients to access nursing facility services, especially in rural communities. Without sufficient Medicaid reimbursement, increased costs due to lower occupancy levels and higher acuties are likely to be shifted to privately paying individuals and insurers.

Estimated Financial and Budget Effects:

The proposed rule changes are necessary to implement legislative funding for nursing facility reimbursement for state fiscal year 2008. The total state and federal funding available for fiscal year 2008 is currently projected at \$141,781,696 which includes \$15,531,931 in state special revenue, and \$28,973,343 in State General Funds. The estimated total funding available for fiscal year 2008 for nursing facility reimbursement is estimated at approximately \$181,138,754 of combined state funds, federal funds, including \$30,667,011 in patient contributions, \$3,544,542 in a 2.5% provider rate increase, and \$5,107,142 in Direct Care Wage funding. Anticipated utilization for state fiscal year 2008 is estimated to be 1,189,566 days according to estimates of caseloads adopted by the Legislature.

The estimated financial effect of the proposed provider funding is approximately \$4,834,874 in reductions of state revenue, federal funds, and patient contributions in fiscal year 2008 from the FY 2007 funding levels due to declining census projected in nursing facilities over the next biennium.

The estimated total funding effect of the one time payment to 'at risk' nonstate government providers and other nursing facilities not determined to be 'at risk' has been projected at \$3,072,497 of state special revenue funds and about \$9,710,800 in total appropriated funding for the Nursing Facility program. The Centers for Medicare and Medicaid Services (CMS), notice of proposed rulemaking (CMS-2258-P) would apply to Nursing Facility services rendered on or after September 1, 2007 and could narrow the sources of funds available in Montana to finance Medicaid expenditures under the rate adjustment for county funded rural nursing facilities, ARM 37.40.311.

These rule changes impact 89 nursing facility providers that participate in Medicaid and up to 5,043 recipients who annually receive nursing facility services under Medicaid.

4. The bill sponsor notice requirements of 2-4-302, MCA, do not apply. This proposal notice does not initially implement new or amended legislation.

5. The department intends to apply the proposed amendments retroactively to July 1, 2007. The department was unable to file this rule at an earlier date because final funding levels had not been authorized by the Legislature. This date will comply with legislative intent to increase Medicaid reimbursement to nursing facilities. No detrimental effects are anticipated as a result of the proposed

retroactive effective date.

6. Interested persons may submit their data, views, or arguments either orally or in writing at the hearing. Written data, views, or arguments may also be submitted to Dawn Sliva, Office of Legal Affairs, Department of Public Health and Human Services, P.O. Box 4210, Helena, MT 59604-4210, no later than 5:00 p.m. on July 19, 2007. Data, views, or arguments may also be submitted by facsimile (406)444-1970 or by electronic mail via the Internet to dphhslegal@mt.gov. The department also maintains lists of persons interested in receiving notice of administrative rule changes. These lists are compiled according to subjects or programs of interest. For placement on the mailing list, please write the person at the address above.

7. The Office of Legal Affairs, Department of Public Health and Human Services has been designated to preside over and conduct the hearing.

/s/ John Koch  
Rule Reviewer

/s/ Russell Cater for  
Director, Public Health and  
Human Services

Certified to the Secretary of State June 11, 2007.